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Special Number in Anticipation of the
250TH ANNIVERSARY OF THE FOUNDING
of the
SUPREME JUDICIAL COURT
on
SATURDAY, NOVEMBER 21, 1942

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Dr. Samuel Johnson's Prayer Before the Study of Law

(*Copied from Birkbeck Hill, "Johnsonian Miscellanies,"* Volume I, Page 35)

Almighty God, the Giver of wisdom, without whose help resolutions are vain, without whose blessing study is ineffectual, enable me, if it be thy will, to attain such knowledge as may qualify me to direct the doubtful, and instruct the ignorant, to prevent wrongs, and terminate contentions; and grant that I may use that knowledge which I shall attain, to thy glory and my own salvation, for Jesus Christ's sake. Amen.

THE 250TH ANNIVERSARY OF THE FOUNDING OF THE SUPREME JUDICIAL COURT

The notice and invitation to the celebration appears in this issue with a detachable application blank to be used in making reservations. It is a unique occasion which marks the anniversary of the real beginning, in Massachusetts, of the separation of the judicial, from the executive and legislative, functions of government — a principle of slow and difficult, but steady, growth in the modern world, which needs thinking about today.

For some months the Committee in charge of the celebration of this historic event has been formulating plans for its proper observance and all members of the bench and bar in Massachusetts are invited, and we believe they will wish to attend if they can.

On Saturday, November 21, at noon, the celebration will begin with exercises in the Supreme Judicial Court Room in the Court House.

At these exercises addresses will be made by —

ATTORNEY GENERAL ROBERT T. BUSHNELL — ROBERT G. DODGE, Esq. and
BENTLEY W. WARREN, Esq. — DAMON E. HALL, Esq.

Chief Justice Field will respond for the Court.

During the afternoon interesting exhibits pertaining to the history of the Court will be on exhibition at — The Old State House; The State Library; The Boston Athenæum, and The Thorndike Library of the Supreme Judicial Court.

The celebration will be concluded with a great banquet at the Copley Plaza Hotel at 7:00 P.M. Reception at 6:15.

The speakers at this banquet will be —

GOVERNOR LEVERETT SALTONSTALL — Hon. WILLIAM D. MITCHELL, former U.S. Attorney General.

JUDGE LEARNED HAND, of the United States Circuit Court of Appeals for the Second Circuit, and

JUSTICE FELIX FRANKFURTER, of the Supreme Court of the United States.

The main theme of the celebration will be, "The Contribution of an Independent Judiciary to Civilization."

Ladies are invited to everything.

As the number of seats for the banquet will necessarily be limited, please mail your reservations *at once*. Dress will be optional.

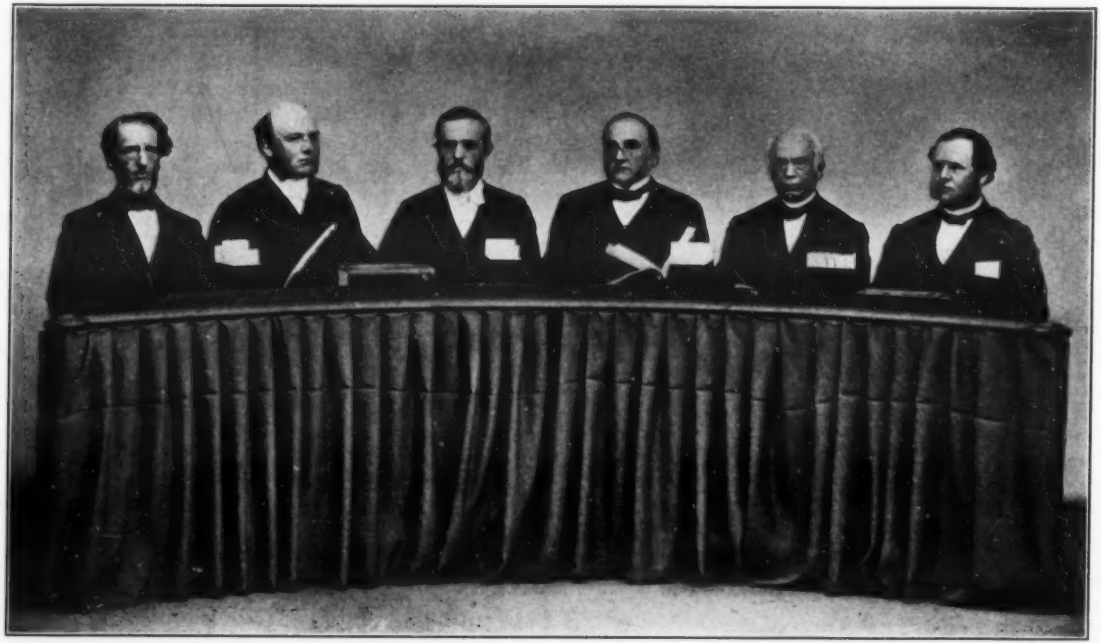
THE ROOMS OF THE MASSACHUSETTS BAR ASSOCIATION AT 5 PARK STREET, BOSTON, WILL BE OPEN DURING THE DAY; THE ROOMS OF THE BAR ASSOCIATION OF THE CITY OF BOSTON, AT 21 SCHOOL STREET, BOSTON, WILL ALSO BE OPEN FOR VISITORS.

In anticipation of the occasion the bar may be interested to have the group pictures of the court at various periods since the 1840's beginning with the Chief Justice Shaw's court of that time. Pictures of the present court and all the chief justices since 1692 will be presented at the dinner on November twenty-first.

HUBBARD, J. WILDE, J. SHAW, C. J. CHARLES A. DEWEY, J.

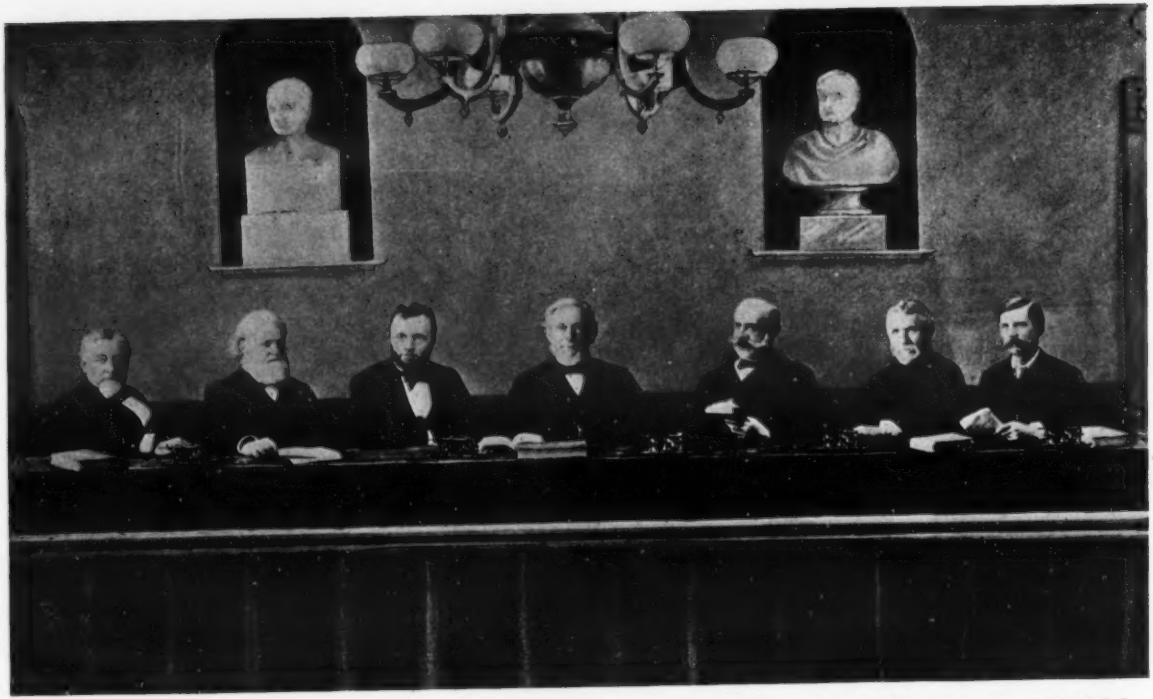
SUPREME JUDICIAL COURT
1842–1847

SUPREME JUDICIAL COURT
1842–1847



WELLS, J. GRAY, J. HOAR, J. BIGELOW, C. J. CHAPMAN, J. FOSTER, J.

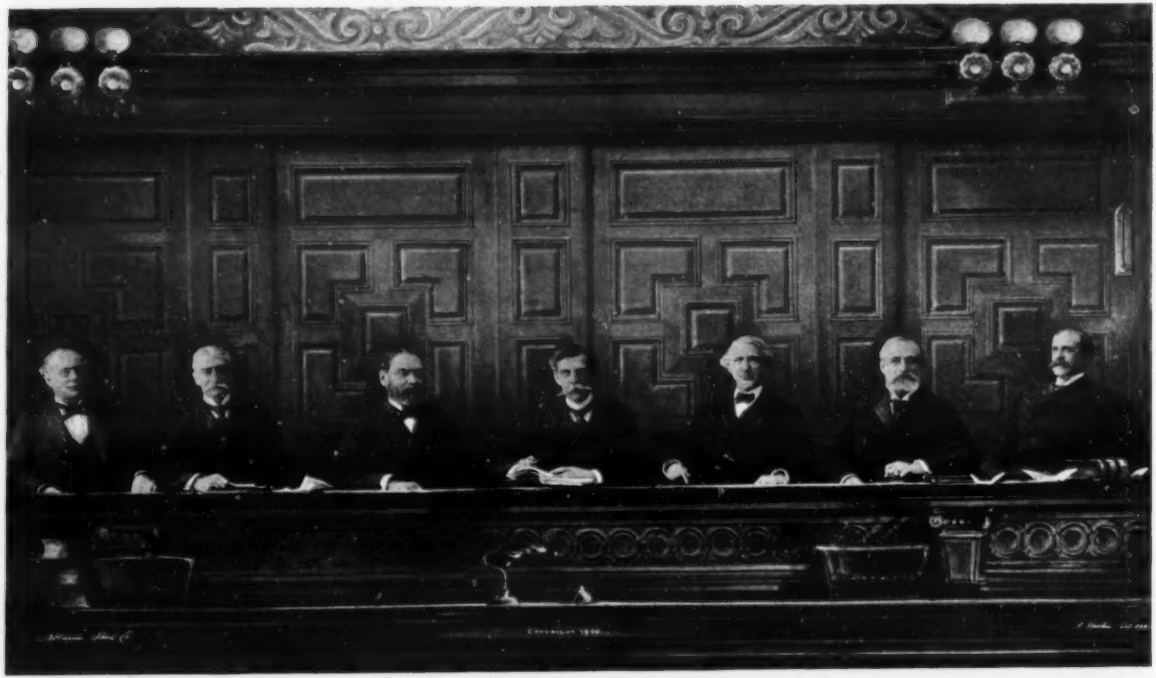
SUPREME JUDICIAL COURT
1866–1868



COLBURN, J. WILLIAM ALLEN, J. FIELD, J. MORTON, C. J. DEVENS. J. CHARLES ALLEN, J. HOLMES, J.

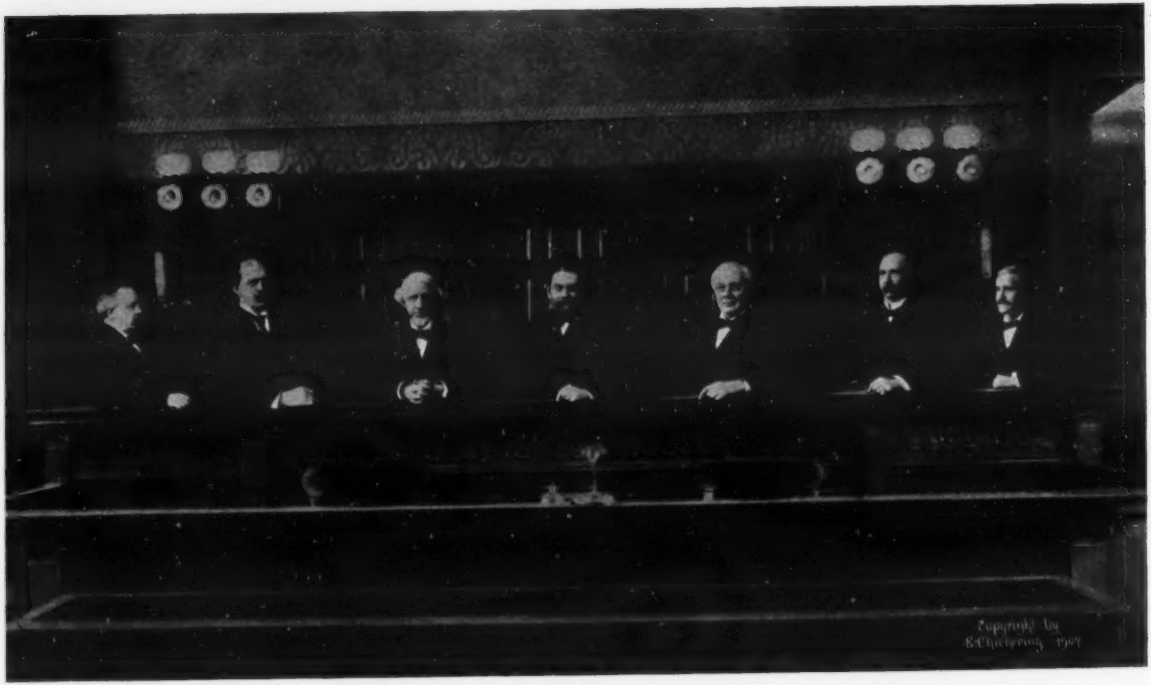
SUPREME JUDICIAL COURT
1882-1885

SUPREME JUDICIAL COURT
1882–1885



HAMMOND, J. LATHROP, J. KNOWLTON, J. HOLMES, C. J. MORTON, J. BARKER, J. LORING, J.

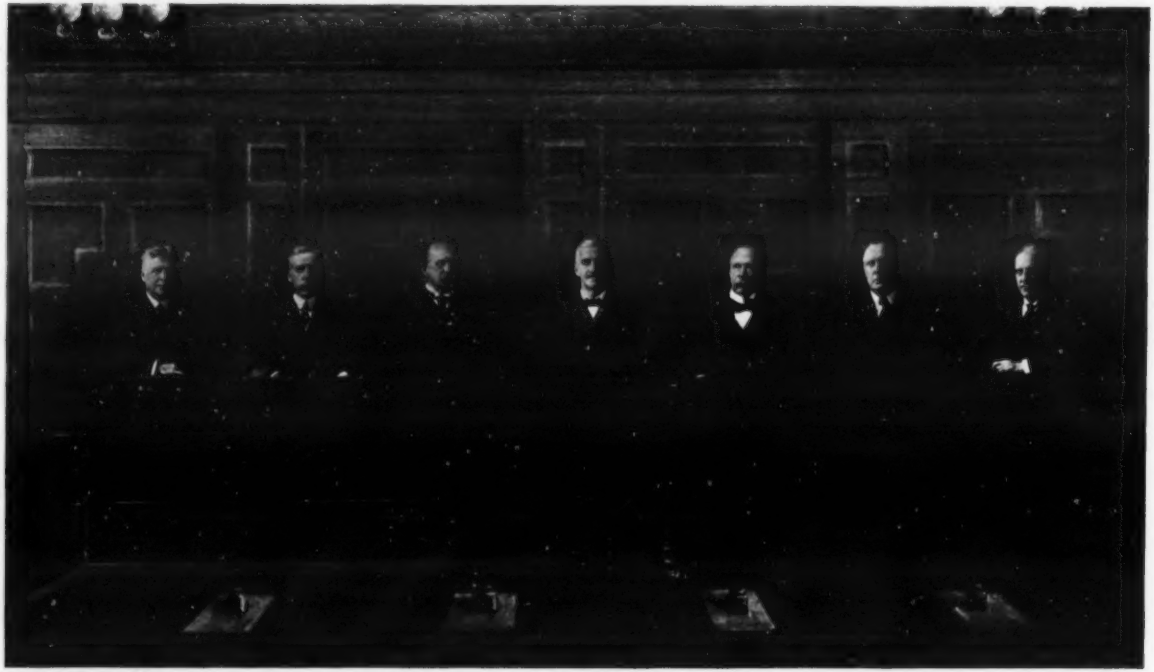
SUPREME JUDICIAL COURT
1899–1902



SHELDON, J. LORING, J. MORTON, J. KNOWLTON, C. J. HAMMOND, J. BRALEY, J. RUGG, J.

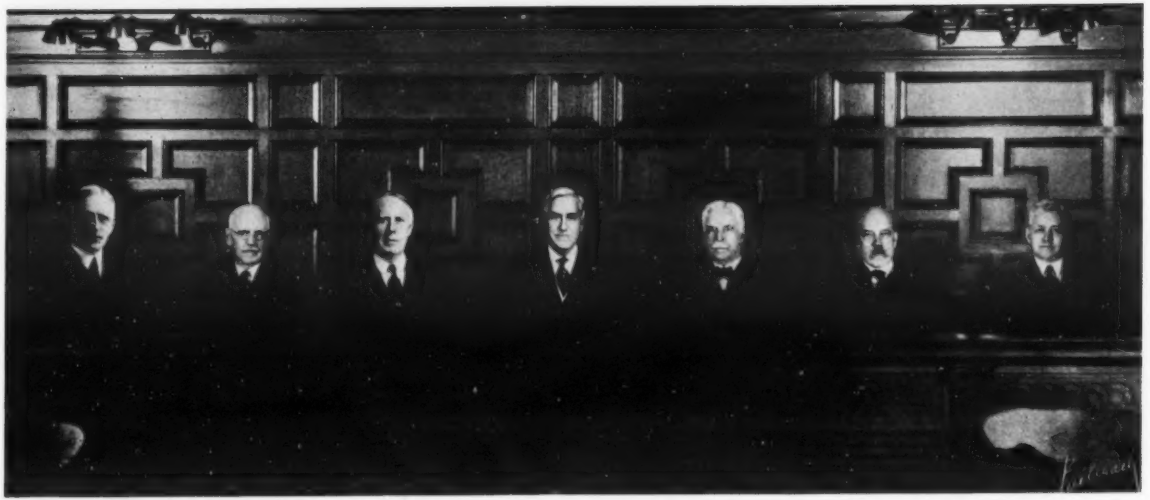
SUPREME JUDICIAL COURT
1906–1911

1906–1911



PIERCE, J. DE COURCY, J. LORING, J. RUGG, C. J. BRALEY, J. CROSBY, J. CARROLL, J.

SUPREME JUDICIAL COURT
1915–1919



SANDERSON, J. CARROLL, J. CROSBY, J. RUGG, C. J. PIERCE, J. WAIT, J. FIELD, J.

SUPREME JUDICIAL COURT
1929–1932

THE EARLY LAW OF CRIMINAL LIBEL IN MASSACHUSETTS

HON. CHARLES WARREN in his *"History of the American Bar"* (pp. 236–239) tells the following story:

"It is probable that no one thing contributed more to enflame the public mind against the Common Law than did the insistence of the American courts on enforcing the harsh doctrines of the English law of criminal libel — that truth was no defence, and that the jury could pass only on the fact of publication and the application of the innuendo.

"In Colonial times, there had been a long struggle between the Royal judges and the writers and printers for a wider freedom of the press; and trial after trial had been held, in which counsel had argued for the greater rights of the jury — notably *William Bradford's Case,* in Pennsylvania, in 1692; *Thomas Maule's,* in Massachusetts, in 1695; *John Chesley's,* in Massachusetts, in 1724 (in which the great John Read defended the printer); and *John Peter Zenger's,* in New York, in 1735 (in which Andrew Hamilton of Pennsylvania made one of the most famous arguments in American history). The narrow English doctrines had, however, prevailed until the Revolution.* When the State Constitutions were being formed, the greatest care had been taken to insert ample clauses, guaranteeing freedom of speech and freedom of the press; and it was supposed that under these clauses the old law of libel could no longer flourish. It was a great shock, therefore, to the public, as well as to many members of the Bar, when Chief Justice Francis Dana held in the first case arising under the new Massachusetts Constitution, in 1791, — *Com.* v. *Freeman* — that the old Common Law of criminal libel had not been altered, and that with all its rigors it was still in force in that state. This decision excited much interest throughout the country. The obnoxious principle of the English law that truth was no defence was again applied in 1801, in the trial of another newspaper editor, Abijah Adams, the ardent Anti-Federalist publisher of the Boston *Independent Chronicle* — Chief Justice Dana, in his decision, terming the Common Law, 'our cherished birthright.' The irony of this term, as voicing the real public sentiment, may be seen from an editorial printed in his paper on the day after Adams' release from prison: 'Yesterday Mr. Abijah Adams was discharged from his imprisonment, after partaking of our adequate proportion of his birthright by a confinement of

* See Opinion in *Com.* v. *Whitmarsh,* Thacher's "Criminal Cases," 441. Truth was allowed as a defense in Pennsylvania in 1692 — see Am. Law Register, Vol. XLIII.

thirty days under the operation of the Common Law of England.' Another editor, John S. Lillie, of the *Constitutional Telegraph,* in Boston, was indicted, in 1801, for libel in referring to Dana as 'the Lord Chief Justice of England,' 'a tyrant judge,' who administered 'that execrable engine of tyrants the Common Law of England in criminal prosecutions.'

"Similar trials for libel were held throughout the United States during the era of Adams and Jefferson; and the decisions of the courts based on the English law became increasingly obnoxious to the public. Though, as Chief Justice Thomas McKean of Pennsylvania said, 'libelling had become a kind of national crime,' and though there seemed to be, at this time, no limit to the license in which political writers and speakers indulged, yet the people at large were not of a temper to have this license stopped by judicial decision. The judges were running counter to the spirit of the times. Everywhere, there was the demand that at least truth must be admitted as a defence, and that the English law must be discarded. Profound effect was produced by two pamphlets *On the Liberty of the Press,* issued in 1799 and 1803 by George Hay, an eminent lawyer of Virginia, in which he took the broad ground that every individual should have freedom to write or speak the truth about any other individual, provided no actual injury was intended or produced.

"Finally, in 1804, Alexander Hamilton made the greatest forensic argument of his life, in vigorous opposition to the English doctrine of libel, in *People* v. *Croswell* (3 Johnson, 337) in which he laid down the principle that 'the liberty of the press consists in the right to publish with impunity truth with good motives and for justifiable ends, whether it respects government, magistracy or individuals.' The court and Chief Justice Kent adopted this to the extent of allowing truth to be published regarding public officers, if without malice. And so great was the impression made on the public that the New York Legislature, at its next session, in 1805, passed a declaratory act on the subject.

"Three years later, the Massachusetts Supreme Court, by Chief Justice Parsons, took the first step towards breaking down the old law, in *Com.* v. *Clap* (4 Mass. 163), by practically adopting Hamilton's doctrine so far as it related to candidates for office and public officers.* Even this was only a partial step; the Ameri-

* "See on this general subject two spicy pamphlets in 1823, A Letter to Joseph Quincy by a Member of the Suffolk Bar, by H. G. Otis; Reflections on the Law of Libel, addressed to a member of the Suffolk Bar, by Edmund Kimball. See also *Com.* v. *Buckingham,* Thacher's Criminal Cases; and Freedom of the Press in Massachusetts, by C. A. Dunniway (1906)."

can law had not yet been brought into conformity with public opinion; and it was not until the decade from 1820 to 1830 that the States, by legislation largely, finally freed themselves from the bonds of the English law of libel.

"The revolt against the Common Law in this one branch is merely an illustration of the general dissatisfaction of the American people and of their determination that their law should be progressive."

INTRODUCTORY STATEMENT TO THE LETTERS OF WILLIAM CUSHING AND JOHN ADAMS

This recently discovered, and hitherto unpublished, correspondence between the first two chief justices, after the Revolution, in regard to the law of libel, relates to a matter of current practical importance now under consideration by the Judicial Council on request of the legislature.

In view of Mr. Warren's story of the decisions of the court when Chief Justice Dana presided and the later discussions in *Com.* v. *Clap* (4 Mass. 163) and *Com.* v. *Blanding* (3 Pick. 304) in 1825, which was promptly followed by the passage of St. 1826 C. 109, extending truth as a defense, the following letters are especially interesting as illustrating the breadth of view of Chief Justice Cushing as to the effect of the constitution. Later in 1789 he was appointed one of the first members of the Supreme Court of the United States. In 1796 he was appointed chief justice but declined on the ground of health and in 1803 he joined with Marshall in the famous opinion in *Marbury* v. *Madison,* the substance of which he had himself applied on the bench of Massachusetts about twenty years before Marshall ever thought of being a judge.*

It is also significant that he was the president of the convention which framed the Constitution in 1780 and John Adams was the principal draftsman of the Bill of Rights, certain provisions of which are discussed in the following letters. These letters sug-

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* It is interesting to speculate on what would have happened if John Adams had not appointed John Marshall and Thomas Jefferson had had the chance to appoint Spencer Roane as chief justice. Roane and Cushing would undoubtedly have agreed on the constitutional function of a court in regard to legislation, but would, doubtless, have disagreed on some of the occasions of its exercise. See *Kamper* v. *Hawkins,* 1 Va. Cases (1793) 21; Warren, "Congress, The Constitution and the Supreme Court," 58, note. Roane was a strong states rights man. Cf. Warren 2nd ed. p. 292; American Historical Review, July 1907, p. 776. Cushing was older and not strong in those days; but he was experienced and wise. An account of Spencer Roane will be found in the "Dictionary of National Biography."

gest that if Chief Justice Cushing had not left the court, when he did, Massachusetts might, perhaps, have led the country in the development of the law of libel ten years before Hamilton made his argument in New York. His views appear far in advance of the views of many of his contemporaries. F. W. G.

Note

The libel case against John Checkley in 1724 indicates that falsity was then considered an essential allegation in an indictment. See "John Checkley" by E. F. Shafter in the Prince Society Publications.

"Original Draft of Letter from William Cushing, Chief Justice to Hon. John Adams, 1789."

(*By permission from the Cushing Papers in the Massachusetts Historical Society*)

Boston, Feby 18, 1789.

Dear Sir,

I know you will forgive me if I draw your attention, a moment, from the weighty matters that employ it, to the subject of libels and liberty of the press, on which I had the pleasure of a word with you lately. Our 16th Article of declaration of rights, holds forth — that "*The liberty of the press is essential to the security of freedom in a State*" *and that it ought not, therefore, to be restrained* within this Commonwealth." I confess I have had a difficulty about the construction of it; which no gentleman, better than yourself, can, in a word, clear up.

My question is this — whether it is consistent with this article to deem and adjudge any publications of the press punishable as libels, that may arraign the conduct of persons in office, charging them with instances of malconduct, repugnant to the duty of their offices and to the public good and safety, *when* such charges are supportable by the truth of fact?

By the law of England it seems clear that, in a civil action for damages, a *libel* must appear *false* as well as scandalous; and the truth of an accusation may be pleaded in bar of a suit, whether brought for words or for a *libel,* 4 Black. 150 and elsewhere.

But on an indictment for a libel, it is held to be immaterial, whether the matter of it be true or false. And this law, Judge Blackstone says, is founded solely on the tendency of libels to create animosities and to disturb the public peace, and that the provocation, and not the falsity, is the thing to be punished criminally. And some books say, the provocation is the *greater* — if true. [Coke's Rep. and others.] The consequence of all which is — that a man ought to be punished more for declaring truth

than for telling lies, in case the truth imports a charge of criminality against any one.

In the case of the Seven Bishops, Mr. Just. Powall (who, Lord Camden said, was the only honest man on the bench, at that time) held that to make the petition a libel, it must be *false* &c., and that the case turned upon the truth of the assertion, *that the dispensing powers claimed by the King, was illegal.* And *he* held the position of the bishops true and right, as to ecclesiastical laws and all other laws whatsoever. He was overruled, indeed, by the other judges, especially Ch. Just. Wright and Just. Allybone; the former laying it down, that whatever disturbed the government or made mischief or a stir among the people, was within the case of libellis famosis and whether true or false, was a libel.

Allybone asserted, that a private man taking upon him to write any thing concerning government, was an intruder into other men's matters, and was a libeller; But the dernier resort, the Jury, overruled all and set them right. The indictments, in that case, charged the petition to be a *false* writing; and I believe no indictment for a libel was ever framed without an allegation of falsity, which, with the reason of the thing may be some apology for Justice Powell's mistaking the law.

It must be confessed, that as the law of England now stands, truth cannot be pleaded in bar of an indictment, though it may of a civil action, for a libel.

The question is — whether it is law now *here.*

The 6th Article of the last chapter of the Constitution is, *that all laws heretofore adopted and usually practiced on in the Courts here, shall remain excepting only such parts as are repugnant to the rights and liberties of this constitution.*

By the spirit and implication of this article, laws of England, not usually practiced on here, are not to have force with us, and laws actually practiced on, but repugnant to the Constitution, are set aside.

If therefore that point has never been adjudged here (and I don't know that it has been), perhaps we are at liberty to judge upon it *de novo* upon the reason of the thing and from what may appear most beneficial to society. And in that case it strikes me as it did honest Powell, that falsity must be a necessary ingredient in a libel.

But to come to our article respecting liberty of the press: the words of it being very general and unlimited, what guard or limi-

tation can be put upon it? Doubtless it may and ought to be restrainable from injuring *characters*; which is one principal object and end of other articles and of government. But charging a man by word, writing or printing, with a crime, of which he is really guilty, is damnum absque Injuria, as Judge Blackstone and others justly observe. And in general no doubt it may be restrained from *injuring* the public or individuals by propagating falsehoods.

But when the article says *"The liberty of the press is essential to the security of freedom"* and that *"it ought not, therefore, to be restrained"* &c., does it not comprehend a liberty to treat all subjects and characters freely, within the bounds of truth?

Judge Blackstone says (4 V. 451) the liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter, when published. Wherein he refers to a public licenser, inspector or controller of the press. That is, no doubt, the liberty of the press as allowed by the law of England.

But the words of our article understood according to plain English, make no such distinction, and must exclude *subsequent* restraints, as much as *previous restraints.* In other words, if all men are restrained by the fear of jails, scourges and loss of ears from examining the conduct of persons in administration and where their conduct is illegal, tyrannical and tending to overthrow the Constitution and introduce slavery, are so restrained from declaring it to the public *that* will be as effectual a restraint as any *previous* restraint whatever.

The question upon the article, is this — What is that liberty of the press, which is essential to the security of freedom? The propagating literature and knowledge by printing or otherwise tends to illuminate men's minds and to establish them in principles of freedom. But it cannot be denied also, that a free scanning of the conduct of administration and shewing the tendency of it, and where truth will warrant, making it manifest that it is subversive of all law, liberty and the Constitution; it can't be denied. I think that the liberty tends to the *security of freedom in a State*; even more directly and essentially than the liberty of printing upon literary and speculative subjects in general. Without this liberty of the press could we have supported our liberties against british administration? or could our revolution have taken place? Pretty certainly it could not, at the time it did. Under a sense and impression of this sort, I conceive, this article

was adopted. This liberty of publishing truth can never effectually injure a good government, or honest administrators; but it may save a state from the necessity of a revolution, as well as bring one about, when it is necessary. It may be objected that a public prosecution is the safe and regular course, in case of malefeasance. But what single person would venture himself upon so invidious and dangerous a task against a man high in interest, influence and power?

But this liberty of the press having truth for its basis who can stand before it? Besides it may facilitate a legal prosecution, which might not, otherwise, have been dared to be attempted. When the press is made the vehicle of falsehood and scandal, let the authors be punished with becoming rigour.

But why need any honest man be afraid of truth? The guilty only fear it; and I am inclined to think with Gordon (Vol. 3 No. 20 of Cato's Letters) that truth sacredly adhered to, can never upon the whole prejudice, right religion, equal government or a government founded upon proper balances and checks, or the happiness of society in any respect, but must be favorable to them all.

Suppressing this liberty by penal laws will it not more endanger freedom than do good to government? The weight of government is sufficient to prevent any very dangerous consequences occasioned by *provocations* resulting from charges founded in truth; whether such charges are made in *a legal course or otherwise.* In either case, the *provocation* (which Judge Blackstone says is the sole foundation of the law against libels) being much the same.

But not to trouble you with a multipliing of words; If I am wrong I should be glad to be set right, &c., &c.

I would not wish, however, to intrude upon your busy hours, devoted to more important matters, and especially, as you are to be speedily called to the weighty concerns of a high office in the federal government, not, indeed, as head; — but to be a pillar to support the head and the whole fabrick; an office to which no man can dispute the ground of your title, as on other accounts so particularly for the share you have had (greater I suppose, in many respects than any other) at home and abroad, from the beginning to the conclusion, in the late revolution. The point now is a stable government, which it to be put in motion soon, and I heartily wish you success. I am &c.

COPY OF ORIGINAL LETTER TO "THE HONOURABLE WILLIAM CUSHING ESQR., CHIEF JUSTICE OF THE MASSACHUSETTS BOSTON"

(By permission from the Cushing Papers in the Massachusetts Historical Society)

Braintree, March 7, 1789

DEAR SIR

I am greatly obliged by the letter you did me the Honour to write me on the 18th of February; and regret very much the want of Leisure to examine the subject of it, with that attention which its great importance requires.

That the Truth may be pleaded in Bar of a civil action for damages for actionable words, spoken or written I remembered very well; but it lay in my mind that some just cause for publishing it, must be added. You may easily conceive a case, where a Scandalous Truth may be told of a man, without any honest motive, and merely from malice. In such a case morality and religion would forbid a man from doing mischief merely from malevolence and I thought would give damages. The case in 11 Mod. cited by Blackstone I have not an opportunity to examine. But this is a point of no great consequence at present.

The difficult and important question is whether the Truth of words can be admitted by the court to be given in evidence to the jury, upon a plea of not guilty? In England I suppose it is settled. But it is a serious Question whether our Constitution is not at present so different as to render the innovation necessary? Our chief magistrates and Senators &c are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped and the people kept in Ignorance we had much better have the first magistrate and Senators hereditary. I therefore, am very clear that under the Articles of our Constitution which you have quoted, it would be safest to admit evidence to the jury of the Truth of accusations, and if the jury found them true and that they were published for the Public good, they would readily acquit.

In answer to the concluding part of your letter, I beg leave to say that I am indebted to your Friendship, in part at least for a destination to another office much too high, difficult and important for my Forces. But having been forced by the course of things, heretofore, so often to undertake Trusts out of all proportion to my Talents and having been supported through them by good Fortune and the favour of the world, I must again rely upon the same assistance, — one comfort has always attended me, — I have been always best supported by those whom I love and esteem the most.

With the highest respect and esteem I have the Honour to be, dear sir, your affectionate Friend and most humble sert.

JOHN ADAMS.

Chief Justice Cushing.

THE CHARLES RIVER BRIDGE CASE (7 Pick. 344, 1829)

By Roscoe Pound

On this annuiversary of the setting up of the Supreme Judicial Court, one might say much about its place in American judicial history. The court was fortunate in being presided over for a generation by one who was not the least of the six outstanding judges of the formative era of our law. It was one of the few American courts whose decisions were cited by judges in England during the time when they cited American decisions, as they are beginning to do once more. It was long one of the most cited of American courts in decisions in the state and federal courts, being exceeded only by the highest courts of New York which had the advantage of determining questions of procedure for thirty code states and of sitting at the chief center of commercial litigation. One might discuss not a few leading cases in which the influence of the court has been decisive. But it may be of more interest to look into a case which it could only decide by the rule governing an equally divided court, in which the decision which established the law was rendered by the Supreme Court of the United States,* two justices (one of them Joseph Story) dissenting. The case is especially interesting because it brings out a striking difference between modes of juristic thought of the era of our constitutions and those of today.

Briefly stated, the facts were that in 1650 the legislature granted to Harvard College the franchise of a ferry over the Charles River from Charlestown to Boston. The ferry had been established by the government of the colony in 1630, and in 1636 the revenue had been given to the College by ordinance. In 1785, the legislature incorporated a company to build a toll bridge where the ferry stood, the company to pay the College £200 a year during the duration of the charter, after which the bridge was to become the property of the Commonwealth. The period of the franchise would not expire till 1855. In 1828, the legislature incorporated another company to build another toll bridge close by with a provision that when the tolls paid for the bridge it should be a free bridge. This diverted traffic from the Charles River bridge and soon destroyed the value of the franchise of the older company. Suit was brought for an injunction, claiming that the act incorporating the Proprietors of the Warren Bridge impaired the obligation of a contract and so was repugnant to the Con-

*11 Pet. 420 (1830).

stitution of the United States, and that it was an appropriation of property of an individual to public use without compensation, repugnant to the Constitution of the Commonwealth. The main reliance was on the former proposition.

How did it come that a question which today seems to have so obvious an answer was thought difficult and doubtful one hundred years ago? Of the four justices who sat in the state court, three thought the granting of the franchise was a contract, but one of them held the franchise was not exclusive, and the opinion of Chief Justice Taney on the writ of error goes largely on that ground also. In effect, the ultimate decision was that there had been no derogation from the grant in the statute of 1785. The way of looking at the case which would be likely to obtain today was no more than suggested by Mr. Justice McLean in the Supreme Court of the United States. To understand this we must look at the background of our bills of rights and especially at the background of the contract clause.

Behind the bills of rights we must see the absolute, unchecked, power of the Privy Council at Westminster over every colony and province, and consequent experience of Americans of our formative era with centralized, undifferentiated, executive and judicial power coupled with a veto on legislation. Almost on the morrow of the Declaration of Independence, Virginia joined a bill of rights to her frame of government, and state after state followed, putting a separation of powers at the foundation and a bill of rights at the forefront of its Constituiton. But this was not all. Seventeenth-century England had seen recurrent confiscations and forced transfers of property during the long struggle with the Stuarts. Each political overturn was followed by forfeitures and grants to the prevailing party, to be undone at the next turn of political fortune. Resumption of royal grants took place under the Commonwealth, and again at the Restoration, and again in Ireland under the rule of James II, and after the Boyne under that of William III. There were bills to resume the grants of Charles II and of William III. Moreover, confiscations and forfeitures during and after the Revolution were fresh in men's memories. Then, too, seventeenth and eighteenth century chancellors had a persistent tendency to make over legal transactions which has left its mark on specific performance with compensation and on precatory trusts. Equity was disliked by the Puritans, and the Long Parliament came very near abolishing it. Stability of titles, stability of legal transactions, appeared to be

essential to a free society and were commonly proclaimed in the declarations of rights.

Two things may be seen behind the contract clause: (1) Experience of repeated forfeitures, resumptions and threatened resumptions, and (2) high-handed legislative attempts to force a debased paper currency upon communities both before and after the Revolution. Mr. Justice McLean, in his opinion in the case, rested the clause historically on the latter. But the Supreme Court of the United States in *Fletcher* v. *Peck** went on a ground that clearly indicates the former. Indeed, it was this background of the clause which led to attempts to make it do what was sought later through the XIV Amendment. There was long less reliance on the provisions as to due process and more on the clause as to impairing the obligation of contracts, because of the wide meaning of the term contract in the books read by students of law before and after the Revolution and the civilian meaning of the term obligation with which those brought up on the seventeenth and eighteenth century treatises were familiar—as we are not.

Sanctity of contracts was then a fundamental ethical, political, and legal idea. As far back as the fourth century, the Council of Carthage had laid down that agreements were to be adhered to and this doctrine entered into the law of Continental Europe, replacing the categories of enforceable pacts in Roman law. The writers on natural law in the seventeenth and eighteenth century put this idea at the foundation of their systems. As Strykius put it in the eighteenth century, the proposition came from the very mouth of God so that God and the devil and the king were bound by contract.

But note what contract and obligation of contract meant to those writers. Contract was then used, and was used in this century as late as Parsons on Contracts in 1853, to mean what the French now call *acte juridique*. It might be called "legal transaction." The idea is that a person, or a number of persons, will something possible and permissible and the law, recognizing his will, or their common will, gives to it the result intended. Not merely contract as we now understand it, but trust, will, conveyance, and grant of a franchise are included. Obligation of contracts is not a term known to the common law. Obligation here is used in the civilian sense meaning the relation between

* 6 Cranch. 87 (1810). It is noteworthy that the Supreme Judicial Court had taken the same view in *Derby* v. *Blake* (1799), reprinted in 226 Mass. 619—the first reported decision in which a state statute was held void as contravening the federal Constitution.

the parties to a legal transaction. The writers on natural law considered that there was a natural legal duty not to derogate from one's grant and so there was this relation between grantor and grantee in an executed transaction. This is the explanation of *Fletcher* v. *Peck*, and no doubt is what the phrase meant to those who wrote it into the Constitution. God and the devil and the king were bound by contract and *a fortiori* the Commonwealth.

Treatises in which these ideas were expounded were the basis of legal education before and after the Revolution. John Adams read Vinnius, Van Muyden, Grotius, and Pufendorf. Isaac Parker prescribed Burlamaqui and Pufendorf to a student. Theophilus Parsons prescribed Vattel to John Quincy Adams. Chancellor Kent read Grotius and Pufendorf. Daniel Webster as a student began with Vattel and Burlamaqui. Moreover, they all read Blackstone and his introduction follows Grotius.

One thing more must be noticed. Stability of franchises, coming down from the Middle Ages, had been insisted upon against the arbitrary action of the Crown. A franchise going back to an original grant for a ferry in 1636 had much the same look in nineteenth-century New England.

Today the case looks very different. The franchise was not exclusive, and we should doubt whether an exclusive franchise for all time would be grantable. Moreover, we are used to such situations as the case presented. Railroads largely put canals out of business. We have seen busses put interurban trolleys out of business. We have seen trucks seriously injure the freight business of railroads. Today we are not concerned about these risks to which all enterprises are now subject. But when enterprises were few and of long standing, the public was not used to seeing one supersede another in a succession of improvements. It seemed very like a wilful destruction of property such as James II indulged in during his brief reign in Ireland. Indeed, Macaulay in the middle of the last century seemed to think there should be compensation in such cases as a matter of natural justice.

Today we are going back to something of what the natural law theories reacted from. Our attitude toward promises has changed. We are told they are but predictions. We are told that a reserved power of the state to make reasonable alterations is an implied term. In the cult of force and of absolute government, which is manifest the world over, we show signs of falling into line. The proposals with respect to the property of citizens of Japanese origin in California have a seventeenth-century sound.

Melanchthon defined liberty as the condition in which each is permitted to keep his own. Certainly that is not our idea of liberty today. It is manifest that more is to be said for the judges of the Supreme Judicial Court who proved to be in the minority than we have been accustomed to think.

ROSCOE POUND.

THE EARLIEST (?) RECORDED APPLICATION OF THE FEDERAL CONSTITUTION BY A STATE COURT

What appears to be the first recorded state decision interpreting the federal Constitution (*Derby* v. *Blake*) was decided in August 1799 by the Supreme Judicial Court. It was reported on the first page of the Columbian Centinel of October 9, 1799. It was referred to by Hon. Charles Warren in his "History of the American Bar" (270 note) and called to the attention of the Reporter of Decisions who reprinted it, as a supplement to 226 Mass., at page 618. A statute of Georgia repealing a land grant involved in the Yazoo Frauds, was held unconstitutional as impairing the obligation of contracts, eleven years before the same decision was rendered, as to the same Georgia statute, by the Supreme Court of the United States in 1811, in *Fletcher* v. *Peck*. The case is referred to by Dean Pound in a footnote to his article in this number on the Charles River Bridge case.

THE CASE OF *HARVARD COLLEGE* v. *AMORY* (9 Pick. 446) — AND THE JUDGE WHO WROTE THE OPINION

This case, decided in 1830, by the Supreme Judicial Court of Massachusetts (then consisting of Chief Justice Parker, Justices Samuel Putnam, Samuel S. Wilde, and Marcus Morton) is one of the outstanding cases in the history of the court. The opinion has had, is having, and is likely to continue to have an exceptionally far-reaching influence throughout the country. It was written by Mr. Justice Putnam, who then stated the general Massachusetts rule as to the administration of trusts in a way which has provided the substance of § 227 of the Restatement of Trusts by the American Law Institute. The paragraph usually cited from this opinion reads:

> "All that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

The following passage in the opinion is equally important as showing a practicable grasp of the problem:

> "Trustees are justly and uniformly considered favorably, and it is of great importance to bereaved families and orphans . . . provided they conduct themselves honestly and discreetly and carefully, *according to the existing circumstances* in the discharge of their trusts. If this were held otherwise no prudent man would run the hazard of losses which might happen without any neglect or breach of good faith."

The foresight shown by these passages is particularly noticeable under the present unsettled conditions. It was in reliance on this opinion as "setting the standard of fiduciary performance adaptable by the courts to constantly changing conditions of life" that the Judicial Council of Massachusetts when its opinion was requested by the legislature in 1939, declined to recommend the passage of the proposed "uniform trust law" submitted by the National Conference on Uniform State Laws. The Council believed that with Judge Putnam's opinion as a background

> "The future development of the law of trusts in this commonwealth should be left to what has been called 'the elasticity of case law' than to substitute statutory rules in an old community on such a subject."*

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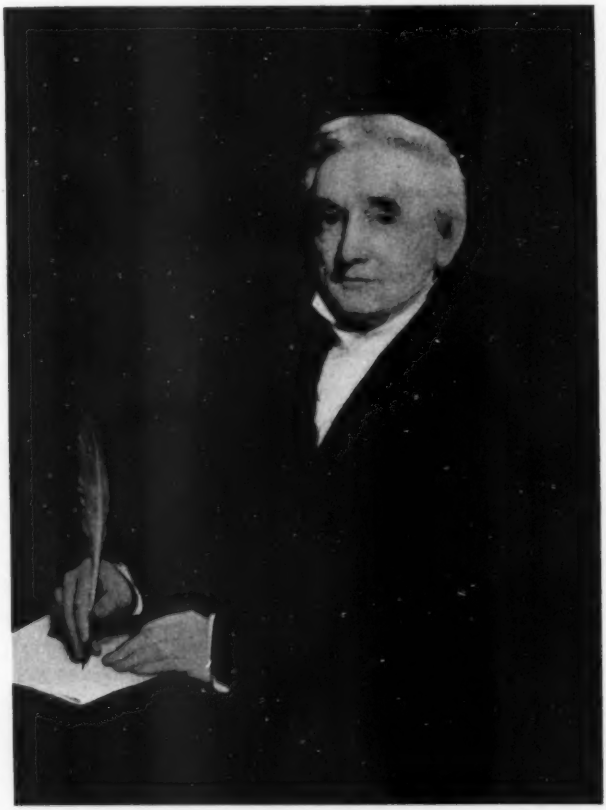
* See 14th Report of Judicial Council, p. 34.



JUDGE SAMUEL PUTNAM

Judge Putnam was born in Danvers on May 13, 1768, the only child of a family of ten to survive to maturity. His father, Gideon Putnam, appears to have begun life as a carpenter and farmer, with an inheritance consisting of his character and thirteen acres of land. Later, I believe, he became the proprietor of the old tavern at Tapleyville. The boy entered Harvard College at the age of fifteen and graduated with John Quincy Adams in the Class of 1787. He immediately began to study law in the office of "Master Bradbury," as he was called, later Judge Bradbury, in Newburyport, where, as he says, "I soon became satisfied that the law did not come by inspiration; and in some degree made up by industry for my idleness in College." After leaving

Judge Bradbury's office he soon entered active practice, acquiring a reputation, rare at that period, as a master of commercial law. This reputation he developed still further on the bench after his appointment in 1814. As an appreciation of his contributions to this branch of the law, in 1841 Judge Story, who as a young man had studied in Putnam's office while he was still at the bar in Salem, dedicated to him his "Commentaries on the Law of Partnership," as follows:

Some years ago, I remember happening upon an interesting appreciation of his opinions on commercial law in a judgment of Lord Justice James in a case in the English Law Reports. Judge Putnam's opinions are likely to repay study today. In a discriminating opinion, based on a grasp of the actual business relations and intentions of the parties, in *Rice* v. *Austin* (17 Mass. 197), in 1821, he disposed of the oracular and erroneous pronouncement of Chief Justice Eyre in *Waugh* v. *Carver* (2 H. Bl. 235), which caused so much trouble in the law of partnership until, and, indeed, after, the case of *Cox* v. *Hickman* in the House of Lords in 1860. If Judge Putnam's reasoning in *Rice* v. *Austin* had been more closely studied, much later confusion in the law of partnership might, perhaps, have been avoided in Massachusetts. Judge Putnam was also one of the judges who presided at the celebrated White murder case in 1830. He was one of the appointees of Governor Caleb Strong of Northampton, to whose judgment of men in his appointments to the bench Massachusetts owes much. Samuel Sewall, Simeon Strong, George Thacher, Theodore Sedgewick, Isaac Parker, Theophilus Parsons (Chief Justice), Samuel Sewall (Chief Justice), Charles Jackson, Daniel Dewey, Isaac Parker (Chief Justice), Samuel Putnam and Samuel S. Wilde were all appointed by Governor Strong. Of these Sewall, Parsons, Jackson, Putnam and Wilde were from Essex County.

The impression which Judge Putnam made upon people generally is suggested by the words, "Oh! I like him," which appears to have been a common remark among those who came in contact with him. In a brief autobiographical account in a letter to a classmate written in 1839, he describes himself as having been idle in college, but having been kept out of harm's way, to some extent, by his love of music.

After entering practice, he says,

> "My first cause was to recover back seven shillings and sixpence which my client, a rich, tough, farmer and townsman, had been compelled to pay as an illegal tax. It involved principles much beyond the value of the sum in dispute. Mr. Pulling argued for the defendants, but my client prevailed."

While a member of the bar, he served in the legislature from 1808–1814, sometimes in the Senate and sometimes in the House.

In regard to his judicial service, he says,

> "I held the office nearly 28 years and was not by sickness or any other cause prevented from attending the court by one-half as many days as I served years.
>
> "I had to travel with my own horse and sulkey, which was contrived to be open or closed, so as to be as comfortable in fair as in stormy weather. In this way I passed over mountain and dale, frequently alone in the night time when it was so dark that I could not see my horse, over roads that were miry and rocky, without once overturning or any personal injury.
>
> "During sessions I used to ride my horse on the saddle (which I carried with me) a few miles almost every day, disregarding a little rain or snow or much cold. I have still the free use of my limbs and continue to ride on horseback."

In this connection, it should be remembered that from 1814, when he was appointed, until 1820, Massachusetts included Maine and the judicial circuits which he was obliged to travel in the manner described must, therefore, have covered both States during that period.

F. W. G.

NOTE

The Pre-Trial Practice in Essex County about 1800

A pamphlet, issued by the Danvers Historical Society, contains a letter written in 1848 about Judge Story to his son, William Wetmore Story, in which Judge Putnam describes a practice of the Essex bar, particularly interesting today, in view of the present nation-wide movement toward pre-trial. Judge Putnam says of Judge Story:

> "He commenced the study of the law in the office of Mr. Sewall of Marblehead and came into my office at Salem upon the appointement of Mr. Sewall" to the Supreme Court. "As soon as he left my office he was admitted to the bar of the County of Essex. And I must say one word of the faithful manner in which he practised with us there. The habit of that bar was to disclose freely to the adverse counsel the points which were to be controverted or admitted, *whereby much expense to clients was saved.* What out of court was agreed to be admitted was always admitted on trial, and so much expense and trouble of witnesses was prevented. No traps were set. But the debatable ground was maintained with as much earnestness as was consistent with good breeding. And in all this your father well played his part. Those agreements were uniformly verbal, but always performed."

ECHOES OF THE MASSACHUSETTS LAWYERS INSTITUTE AT SWAMPSCOTT ON MAY 9, 1942

(From the Leaflet Presented at the Dinner)

PORTRAIT OF THE CHIEF JUSTICE AS HE MIGHT, PERHAPS, HAVE APPEARED IN 1942, BUT FOR THE DECISION OF CHIEF JUSTICE DANA IN 1792*

*Before and for a short time after the Revolution, the bar was classified into barristers and attorneys and both judges and barristers wore wigs and gowns. Their appearance is described by William H. Sumner in his memoir of his father, Judge (later Governor) Increase Sumner as follows:

"The dress of the Judges before the Revolution, and which was continued by them afterwards, was a black silk gown worn over a full black suit, white bands, and a silk bag for the hair. This was worn by the Judges in civil causes, and criminal trials, excepting those for capital offences. In these they wore scarlet robes with black velvet collars, and cuffs to their large sleeves, and black velvet facings to their robes. The dignified appearance of the Judges, in either dress, made an impression upon the public mind of reverence for the authority of the law. The use of the robes was discontinued soon after the appointment of Judge Dawes to the bench (1792). The Judge was a man of small stature, of a most amiable and excellent disposition, somewhat of a poet, but had a slight impediment in his speech and lisped. The Chief Justice took umbrage at this appointment, on account of what he considered the undignified appearance and utterance of Judge Dawes, and alleged that it was not for his qualifications, but by the influence of his father, who was a member of Governor Hancock's Council, that he was appointed. Soon after Judge Dawes took his seat upon the bench, the Chief Justice came into Court without his robes, while the side Judges had theirs on. Upon their retiring to the lobby after the adjournment of the Court, Judge Sumner remonstrated with the Chief Justice against *his* undignified appearance without his robes, and said, 'If you leave yours off, Chief Justice, we shall ours also; but remember what I say, if people get accustomed to seeing the Judges in a common dress, without their robes, the Court will never be able to resume them.' The Chief Justice, with a remark of great asperity, persisted in his determination, and from that period the robes, which gave such dignity to the bench, were laid aside."

The Court sat without robes for more than 100 years, until March 5, 1901, when as a result of a petition from leading members of the bar, the present costume was adopted of a simple black silk robe.

The late Attorney General Albert E. Pillsbury was quoted at the time as saying, in characteristically caustic fashion, "It is desirable that the judges should, at least, have the appearance of learning." As to Judge Dawes see also Amory's "Life of James Sullivan," p. 261.

THE SONG OF THE CHIEF JUSTICE

(The Chief Justice wishes us to state that he has not written much verse lately, and no apology is made for the shifting meter of the song. It is sometimes easier to write verse free from the restrictions of rules. — EDITOR.)

THE CHIEF JUSTICE

My court is the embodiment
Of everyone that's excellent.
We have no kind of fault or flaw,
For we know, or "find," or "make" the law.
Through two and a half long centuries
We have guarded the Bay State's liberties;
And if you think we're sometimes wrong.
Don't mention it, or you'll spoil my song;
And that, I think you'll all agree,
Is a very natural plea from me.

CHORUS OF THE BAR

A very natural pleading song
From the chief of a court that can't go wrong.

THE CHIEF JUSTICE

In sixteen hundred and ninety-two
While the clergy ruled and the bar was few,
The court was born in troublous days
And arrived on the heels of the witchcraft craze;
But it met the test and it did not fail
For it let all the prisoners out of gaol.
'Twas a most appropriate thing to do
When the court was young and the law was new.

CHORUS OF THE BAR

We like to hear him state his view
Of something with which he had nothing to do.

THE CHIEF JUSTICE

No lawyers were on, or off, the court,
For the Puritans did not like their sort
Until their business began to grow
So they needed some rules
Which the court could know;
But to get the rules in that time afar
The 18th Century needed a bar,
So the bar came slowly and took its cue
By teaching the court what the lawyers knew.

CHORUS OF THE BAR

So the lawyers knew there was time to save
By teaching judges how to behave.

THE CHIEF JUSTICE

In Story's day, as all of you know,
The federal courts thought they "ran the show"
Whenever they thought they found a flaw

In the state court's view of the "general" law;
But Swift v. Tyson no longer rules,
And the state courts now are federal schools
To teach the circuit courts of appeal
What they must do, however they feel.*
'Tis a difficult task that we have at hand
To express ourselves so they'll understand,
For Judge Magruder may tell you that
He finds it hard to know what's what.

CHORUS OF THE BAR

He's talking now of the present crisis
And a rule once known as stare decisis.
The common law is a wonderful thing
When some of our judges have their fling.

THE CHIEF JUSTICE

The court is aware that it would be nice
If all its opinions were more concise;
But, in the West, long opinions are†
Alleged, by the court, to be due to the bar.
Of course, I know, this may seem queer
But, perhaps, it is more or less so here;
For you doubtless like to have the court
Make your case a matter of grave import
So that your client may promptly feel
The case was one that deserved appeal.

CHORUS OF THE BAR

There may be something in what he says
For a client is serious when he pays;
But war-time economists hold the view
That opinions ought to be "rationed" too.

THE CHIEF JUSTICE

The Court tries hard to be correct
That legal rules it may perfect,
And if some flaws you still detect,
Remember we must be circumspect,
Lest something, or other, we may neglect;
And if the wrong course we elect
We may lose part of the bar's respect.

CHORUS OF THE BAR

In order that they may be correct
We see that they must be circumspect;
Tho' sometimes *laymen* may expect
A court, at times, to be more direct.‡

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*"Judge Parker and Judge Magruder were doubtless interested in the following description of the function of the Federal Court, recently given by Judge Jerome Frank, of the Circuit Court of Appeals for the Second Circuit, in *Richardson* v. *Com.* (42–1 U.S.T.C. 10, 142 p. 7947), where he said, 'In searching for the correct legal rule to be used in reaching our answer, we are not *here* compelled by *Erie R.R.* v. *Tompkins* to play the role of ventriloquist's dummy to the courts of some particular state.'"

† See "American Judicature Society Journal" for April, 1942, 170, where Mr. B. H. Kizer, of the Spokane bar, writes: "The average judge, when I ask him to reduce the length of his opinion, agrees with me enthusiastically. He says, in effect, 'My heavens, Kizer, you do not suppose I write twenty pages merely for love of writing if I could get away with two or six? If I don't cover every point meticulously in my opinion, the lawyer, in his petition for rehearing, jumps all over the court. He says we have ignored his argument, or we have failed to indicate that we have read this or that case. . . . Our opinions are written in part to convince the defeated lawyer that he and his client have had a fair trial, that the judges have seriously labored over his case and have given him all the consideration to which he is entitled."

‡ See next page, second footnote.

THE CHIEF JUSTICE

I am rather surprised that a chief justice
Is expected to sing a song like this;
Perhaps, my colleagues can dance and sing,
Or Judge Donahue say some amusing thing;
But I've had no time to entertain
Since I wrote a skit about Lord Haldane,*
Though, had I time, I could show you how
I might be even wittier now.

CHORUS OF THE BAR

He might be even wittier now
And we're very glad that he knows how.

THE CHIEF JUSTICE

We shall have a birthday in the fall
To impress our importance upon you all;
So please remember and be on hand,
If the Germans let the court house stand
And, even if not, we will find a way
As the temple of justice is here to stay;
Whatever they think, or whatever they do,
For the temple of justice depends on you!

CHORUS OF THE BAR

That's a very appropriate thing to say
When inviting us all to the court's birthday;
And since, in that earlier time afar
The court was taught by the growing bar,
We will celebrate this occasion rare,
And flatter ourselves — so we'll all be there.

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*Describing an imaginery philosophical conversation between Lord Haldane and R. G. Dodge, Esq., of the Boston bar, in London.

Note to Last Chorus on page 3.

‡THE PARTY OVER THERE — A STORY BY AMBROSE BIERCE
(From "Subtreasury of American Humor" by E. B. White and Catharine S. White [1941] p. 140)

A Man in a Hurry, whose watch was at his lawyer's, asked a Grave Person the time of day.

"I heard you ask that Party Over There the same question," said the Grave Person. "What answer did he give you?"

"He said it was about three o'clock," replied the Man in a Hurry; "but he did not look at his watch, and as the sun is nearly down I think it is later."

"The fact that the sun is nearly down," the Grave Person said, "is immaterial, but the fact that he did not consult his timepiece and make answer after due deliberation and consideration is fatal. The answer given," continued the Grave Person, consulting his own timepiece, "is of no effect, invalid, and void."

"What, then," said the Man in a Hurry, eagerly, "is the time of day?"

"The question is remanded to the Party Over There for a new answer," replied the Grave Person, returning his watch to his pocket and moving away with great dignity. . . .

A MESSAGE FROM THE PRESIDENT TO MEMBERS OF THE MASSACHUSETTS BAR ASSOCIATION

The "Massachusetts Lawyers Institute," in Swampscott last May, the opening of the new quarters at No. 5 Park Street for the convenience of members of the Association, and the movement during the past year to increase the membership of the association and broaden its activities for the service of the bench and bar, resulted from the referendum taken a year ago on the question whether the Massachusetts bar should be organized as a whole, as in a considerable number of other states, for the purpose of meeting the professional problems of increasing variety which arise both inside and outside of the Commonwealth and affect the practice of every lawyer and all his clients. These problems are not in any way peculiar to Massachusetts in their general nature, although in some particulars Massachusetts is in advance of other states just as some other states are in advance of Massachusetts in other particulars.

In the referendum on organization of the bar in March 1941, the circular and postal ballot were sent to every lawyer in Massachusetts,—the first communication so far as we know that was ever sent out to the whole bar. About 2,000 voted in favor of complete organization; about 1,000 voted against it; and about 6,000 did not vote at all. The incidental discussion, however, was stimulating. The fact that 2,000 lawyers believed that more organized service was needed to meet the future and that many of those who voted "No" believed that the existing voluntary associations could meet the problems if they were more fully developed, is a fact which cannot be ignored if the bench and bar are to keep up with the procession. All the states in the country have state bar associations. Each state bar association as well as the larger local associations are represented in the House of Delegates of the American Bar Association, which, since its reorganization in 1936, has become a much more representative body than ever before, with an increasing professional influence throughout the nation.

It is not the purpose or the practice of state associations to interfere with local associations,—on the contrary, the purpose is to bring about greater co-operation and mutual understanding, and service, throughout each jurisdiction. That is the modern professional spirit in these days when organized effort has become necessary in all branches of activity, public and private. It is the spirit in which the Massachusetts Bar Association was first organized in 1909, by men from all parts of the Commonwealth, with the Hon. Richard Olney as president. The effort has been made ever since that time to encourage the same spirit. As a step in that direction since 1932, the executive committee of the association has contained a majority of 14 locally chosen ex-officio members in the persons of the presidents, or other delegated members, of 14 other associations.

Men often ask, "Why should I join the state association in

these expensive days, in addition to local associations? What is there in it for me? Is it not an association run by a clique of a few Boston lawyers? What is all the fuss about anyway?"

The answer is: first, that the problems are too many and too great for individuals, or any local group, to meet. The profession, as a whole, and every member of it in his practice suffers, has suffered in the past, and probably will suffer more in the future from the inertia of the bar, unless there is more active and widespread organized effort. The idea that the state bar association is simply an association run by a Boston "clique" is, and always has been, a mistaken idea, simply because many lawyers have failed to understand the facts and have guessed at a conclusion. The present organization in its committees contains many men and women from all over the state.

As to what the association has done for the bar during the past 33 years, much of it is either not known, or has been forgotten, because many men have forgotten to read what has been sent to them, although the whole story of the 33 years has been sent out in print and is still available. As this story is a long one, one illustration will be mentioned only, the book account statute of 1913, now appearing as G.L. Chap. 233, Sec. 78. That statute was the first, or one of the first of its kind, in the country, and has saved lawyers and clients time and money ever since. It was carefully drawn and carried through the legislature by the Committee on Legislation, of which the late David A. Ellis was at that time chairman. In addition to this, and other acts for the convenience of the bar, the bench and bar have been kept informed as to proposed legislative, or constitutional, changes, more than ever before in the history of the Commonwealth, through the "Massachusetts Law Quarterly" and the earlier reports of the Committee on Legislation from 1910 to 1915. All this has been done and the bench and bar have received the benefit, generally without realizing it, at the cost of the $5 annual dues of those lawyers who joined the association.* Probably every lawyer in the state has received annually more than $5 worth of benefit and convenience of money, or time-saving, as a result of the work of the association, without knowing it.

Yet, out of the thousands of lawyers in the state, the membership has fluctuated in the neighborhood of 1,000—at times as high as 1,250 and at other times during the depression as low as 650. During the past year about 350 members have joined or rejoined the association.

The question is whether the bar and the bench wish this sort of service to continue, and whether they believe that, if we are not to have an integrated bar as a whole, the voluntary state bar association is worth supporting.

The work cannot be done adequately by any one or more local association. Unless Massachusetts is to step out of the picture,

*The dues for members less than 3 years at the bar are $2.00. By vote of the executive committee, members in military service are exempt from dues, after the initial payment, during their service.

relatively speaking, as a forward-looking state, taking its place through a vigorous state association in the nation-wide professional conferences, as well as in its activities within the Commonwealth, a stronger association to bring about co-operation seems to be needed now, more than ever before, for the benefit of the bar and of the bench.

That is the practical reason, affecting every lawyer in Massachusetts, why we are trying to strengthen the state association; not in any sense to weaken, or interfere with, the other associations, but, on the contrary, to help to bring about greater co-operation and understanding among them all.

MAYO A. SHATTUCK,
President.

NOTE

Shall we have another "Lawyers Institute"? That question is under consideration by the executive committee. We shall be glad to hear from members on the subject.

The Institute in Swampscott on May 8th and 9th was largely attended in spite of difficult traffic problems resulting from the "dimout" etc. It appeared to be a success in the minds of those present.

This number of the "Quarterly" is devoted mainly to subjects connected with the Supreme Judicial Court in anticipation of the coming celebration on November 21st. The next issue will contain a summary of the proceedings at the Swampscott "Institute" and the 31st annual meeting of the Massachusets Bar Association. It will also contain R. D. Swaim's 8th Supplement to the 6th Edition of Crocker's "Notes on Common Forms" and other material of interest to practising lawyers. A special number containing pictures of all but one of the Chief Justices since 1692 will be presented at the banquet on November 21st.

ANNOUNCEMENT OF 1943 ESSAY CONTEST

Conducted by

AMERICAN BAR ASSOCIATION

Pursuant to terms of bequest
of Judge Erskine M. Ross, Deceased

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"What Should Be the Function of the States in Our System of Government?"

Time when essay must be submitted:
On or before March 16, 1943.

Amount of prize:
Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly wtih the Executive Secretary of the Association who will furnish further information and instructions.

AMERICAN BAR ASSOCIATION
1140 N. Dearborn St. Chicago, Ill.

Reprinted from AMERICAN BAR JOURNAL, October, 1942

ALIEN PROPERTY CUSTODIAN'S ORDER AS TO SERVICE OF PROCESS ON PERSONS IN ENEMY-OCCUPIED TERRITORY

The Attorney General invites suggestions from the bench and bar in connection with the following communication. Suggestions may be sent directly to Mr. Westgate, Assistant Attorney General, State House, or to the Editor.

F. W. GRINNELL, *Editor.*

THE COUNCIL OF STATE GOVERNMENTS
1313 EAST SIXTIETH STREET
CHICAGO, ILLINOIS

Transportation Building
Washington, D.C.

October 8, 1942

HONORABLE ROBERT T. BUSHNELL
ATTORNEY GENERAL
STATE CAPITOL
BOSTON, MASSACHUSETTS

MY DEAR GENERAL:

Due to the prohibition against communication and the suspension of postal communication with persons in enemy countries or enemy-occupied territory during time of war, the Alien Property Custodian is authorized to act for such persons in connection with the acceptance or service of process or notice or with representing such persons in pending court or administrative actions or proceedings. A copy of General Order No. 6 of the Alien Property Custodian dealing with this matter is enclosed.

The service of process or notice in matters pending in State courts is governed in some States by statute and in other States by rules of court, where the persons upon whom service of process or notice is to be made are not within the jurisdiction of the court. Since the Alien Property Custodian lacks facilities for discovering in what States court procedures can be conformed to Order No. 6 without legislative action (that is, by administrative action of the rule-making authority in the State) and in what States legislative action is necessary, we have been asked to obtain your advice with respect to the following questions:

1. Is legislation necessary in your State in order to conform the mode of service of process in your State to service of process on the Alien Property Custodian in accordance with the provisions of General Order No. 6?

2. If not, what is the rule-making authority in your State, and how should it be addressed?
3. What suggestions can you make as to the draft of a proposed bill and amendment to existing legislation in your State, if required?

Since the Drafting Committee of the Council of State Governments meets within the near future to review State legislation proposed by Federal war agencies, it would be most helpful and deeply appreciated if you could furnish this information for the use of the Alien Property Custodian, as well as our Drafting Committee, within a week.

With kindest personal regards, I am

Very sincerely,

(Signed) FRANK BANE
Frank Bane
Executive Director

OFFICE OF ALIEN PROPERTY CUSTODIAN
WASHINGTON, D.C.

GENERAL ORDER NO. 6

SERVICE OF PROCESS UPON ANY PERSON WITHIN ANY DESIGNATED ENEMY COUNTRY OR ANY ENEMY-OCCUPIED TERRITORY.

Under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned hereby issues the following regulation:

1. In any court or administrative action or proceeding within the United States in which service of process or notice is to be made upon any person in any designated enemy country or enemy-occupied territory, the receipt by the Alien Property Custodian of a copy of such process or notice sent by registered mail to the Alien Property Custodian at Washington, D.C., shall be service of such process or notice upon any such person, if, and not otherwise, the Alien Property Custodian within sixty days from the receipt thereof shall file with the court or administrative body issuing such process or notice, a written acceptance thereof.

2. Such process or notice shall otherwise conform to the rules, orders or practice of the court or administrative body issuing such process or notice.

3. This order shall not be construed to limit the authority of the Alien Property Custodian to take any measures in connection with representing any such person in any action or proceeding as in his judgment and discretion is or may be in the interest of the United States.

4. For the purposes of this order the terms:

(*a*) "Person" shall mean any individual, partnership, association or corporation;

(*b*) "Designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future;

(*c*) "Enemy-occupied territory" shall mean any place under the control of any designated enemy country or any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication.

Executed at Washington, D.C., August 3, 1942.

LEO T. CROWLEY
Alien Property Custodian

INTERNATIONAL LAW

April 28, 1942.

To the Editors of All State Bar Journals:

The enclosed article may interest you. I am engaged in a campaign to popularize the study of International Law by American lawyers, believing that we need it now, and will need it more and more. In order to help them in their studies, it occurred to me that the Bar Libraries ought to have the books that they would need. At the request of the Editor of the Missouri Bar Journal, I prepared the enclosed article which will appear in their next month's issue. The editor has told me that he is willing that it be reprinted in any other Journal, not earlier than the May number, with due credit to the Missouri Bar Journal.

Very truly yours,

JOHN H. WIGMORE.

THE IMPORTANCE OF AMERICAN INTERNATIONAL LAW TODAY FOR AMERICAN PRACTITIONERS

By JOHN H. WIGMORE

I have devoted myself, this past year, to an attempt to convince my fellow-American lawyers that International Law is not merely a foreign subject, nor just a parlor subject, but is an *American* subject, and withal a practical subject, i.e., one whose knowledge will enable the practitioner to earn a fee.

When the Congress in 1935 and 1937 began passing Acts suspending the exercise of time-honored *rights* of American citizens as neutrals, and when copious Executive Orders and Departmental Regulations sent many lawyers scurrying to Washington to find how their clients' business would be affected by those laws and regulations, the correctness of my proposition above stated began to be fairly evident. When in 1941 the Congress began to modify and to repeal those Acts, and to go even further by repudiating the restrictions of what used to be our *duties* as citizens of a neutral State, my proposition took on a more active meaning. And finally, when December 7 and 8 came, with the declarations of war and another batch of Statutes and Executive Orders and Regulations suited for a state-of-war, my proposition became imperative, i.e., the American lawyer *must* know some elementary American international law.

As an effective means of convincing him of this, as well as of helping him in the task, I prepared last summer Part I of a "Guide to American International Law for American Practitioners", by compiling a sort of primer of 200 topics and annexing to each topic a sheaf of *American* treatises ("law of the land"), and statutes, and decisions applying the principles of international law to American affairs. And when the war-status arrived, I had also on hand Part II of this Guide, "Law for a State-of-War", with 100 citations of treatises, 100 of statutes, 300 of judicial decisions, and 100 of orders and regulations. These two booklets I donated to the legal profession and published them through the American Bar Association (1140 North Dearborn Street, Chicago); the author takes no royalties, and the Association prints at cost, — 50 cents for Part I (50 pages) and $1 for Part II (80 pages).

Now in these booklets only American authorities are cited. Moreover, the materials cited are reduced to a virtual minimum, i.e., to those which are or ought to be and may well be found in any association or county bar library, the standard United States Code and later statutes and the Federal and State reports.

However, there are included additional citations besides the above. And as these additional ones may not ordinarily be carried even in a good bar library, the question occurred to me, How can I help such a library to stock up with these needed authorities, so as to serve the practitioner? So I propose here to take advantage of the editor's kind invitation by offering a list of these additional source-materials with an estimate of the cost of acquisition.

(THE LIST OF SUGGESTIONS TO LAW LIBRARIES MAY BE OBTAINED ON REQUEST.)

SOLDIERS' AND SAILORS' CIVIL RELIEF

Important Law Amendments on Debts, Taxes, Mortgages, Leases, Interest, Life Insurance, Etc.

By Ganson J. Baldwin of the New York Bar
(*Author of "Legal Effects of Military Service"*)

The new law reviewed briefly in this article gives extraordinary benefits and relief to soldiers, sailors and draftees and their families. It is also important to landlords, creditors, members of the bar and the public generally.

Ganson J. Baldwin
72 Wall Street, New York.

A far reaching law to allow many persons in military service to pay off their debts in installments after service, cancel their leases, limit their interest charges to 6 per cent, and aid them in many new ways, has been passed by Congress and became effective on October 6, 1942.

Dependents may also obtain relief as to their own debts in many instances under the new law.

It is the first extensive revision of the Soldiers' and Sailors' Civil Relief Act, which had already granted relief as to evictions, income taxes, real estate taxes, installment purchases, repossessions, foreclosures, mortgages, lawsuits, judgments, garnishments, attachments, life insurance premiums, etc.

The purpose of the law is to relieve the men in our armed forces from financial or legal difficulties which might impair their efficiency or morale, or prejudice their rights while away from their homes and businesses.

Creditors are not reimbursed by the government for losses they sustained when leases are canceled, interest rates reduced, etc.

Obligations Generally.

The new provisions allow any debt incurred before service to be suspended by a court during service and paid off after service in installments over a period equal to the full period of service, if ability to pay is reduced by being in service. Interest payments may also be suspended during service and added to the debt. To obtain this relief the debtor must apply to a court, upon notice to the creditor. The court may limit the relief to fit the circumstances.

Taxes.

Taxes and assessments falling due either before or during service may be treated in the same way.

Mortgages.

Real estate mortgages and contracts to buy real estate, if made before service and payable in installments, may be suspended in the same way, but an even longer period after service is allowed to pay off the principal and accumulated interest, the period in such cases being the full period of service *plus* the then unexpired period of the mortgage or contract.

Leases.

Leases made before entering service on premises occupied for dwelling, professional, business, agricultural, or similar purposes may be cancelled at any time during service by mailing or delivering to the landlord, or his agent, a written notice effective 30 days after the next monthly rent day. No application to a court is necessary. Landlords may apply to a court to prevent or modify a termination where the privilege is abused.

Interest.

Interest is limited to 6 per cent while in service after October 6, 1942, on any debt incurred before entering service, unless the creditor applies to a court and shows that the debtor's ability to pay a higher rate is not reduced by his being in service, in which case the court may fix a fair rate. The 6 per cent must include service charges, renewal charges, fees, or any other charges, except bona-fide insurance in connection with the debt.

Life Insurance.

Premiums on life insurance up to $10,000 (instead of $5,000) will be guaranteed by the government to prevent lapses during service and two years thereafter (instead of one year), if the insurance comes within the requirements of the law. The old requirement that loans must be less than 50% of the cash value is repealed. However, the insurance must have been taken out at

least 30 days before entering service (or before October 6, 1942). The insured must pay the accrued premiums within two years after service, in so far as the cash value is not sufficient to cover them, and if he fails to do so the U.S.A. pays the insurance company (and he must reimburse the U.S.A., which was not required under the old law).

Assignees of life insurance pledged as security for loans, etc., before the insured entered service cannot turn the policies in for the cash value, etc., during his service or one year thereafter, except by permission of a court or by written consent of the insured during that period, unless the premiums are not paid (but premiums are not deemed to be unpaid if guaranteed by the U.S.A.). Insurance companies as assignees under policy loans are excepted (but such policies are protected if the U.S.A. guarantees the premiums).

Co-makers on Notes.

Co-makers on notes and other obligations of men in service may obtain the same relief as indorsers and guarantors, the status of co-makers having been in controversy under the old provisions. All persons primarily or secondarily liable on a debt of a person in service may now be protected, when relief is granted to the person in service.

Dependents.

Dependents who themselves have made leases, or mortgages, or purchases on the installment plan, or secured loans, may apply to a court for relief if their ability to pay is reduced due to the service of the person upon whom they are dependent.

Other New Provisions.

Draftees now get many types of relief from the time they receive an order to report for induction. United States citizens who joined the forces of our allies get the same protection as those in our own forces. Sureties on criminal bail bonds for a person in service may be released when service prevents his being produced in court. Suits to repossess autos or tractors could not be stayed under the old law if less than 50 per cent had been paid, but the new law protects the purchaser if any payment had been made. Tax sales and tax proceedings are prohibited during service, except by permission of a court, and the present provision requiring the person in service to file an affidavit with the tax collector to get such protection has been repealed. Local taxation of military personnel serving in various States, counties or municipalities where they do not regularly reside is also prohibited as to income and personal property taxes.